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SUPREME COURT
STATE OF WASHINGTON
2006 OCT 12 A 8:00

BY C.J. MERRITT

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 77719-5
)	
vs.)	RESPONSE TO MOTION TO
)	STRIKE
N.M.K.,)	
)	
Petitioner.)	
)	
)	
)	
_____)	

1. IDENTITY OF RESPONDING PARTY

The State of Washington is the respondent in this appeal.

2. STATEMENT OF RELIEF SOUGHT

The Respondent respectfully asks that this Court deny petitioner's motion to strike an argument in the Respondent's Supplemental Brief.

3. FACTS RELEVANT TO MOTION

N.M.K. was charged at trial with reckless driving and driving with a suspended license. He admitted to the arresting officer that he did not have a driver's license. At trial, his lawyer moved to suppress those statements, claiming that the arresting officer had failed to read the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). His lawyer never argued that he was illegally seized, never cited Art. 1, § 7 of the Washington Constitution, and never obtained findings of fact or conclusions of law on a search and seizure theory.

On appeal, counsel argued for the first time that the officer had illegally seized him pursuant to Art. 1, § 7. Br. of App. at 1. Counsel even attacked the lack of factual findings for the argument never made below. Br. of App. at 10.¹ Counsel also assigned error to the Miranda ruling. Br. of App. at 1. The State responded that N.M.K. had mistakenly framed the issue as a search and seizure issue, and also argued that the trial court's Miranda ruling was appropriate. Br. of Resp. at 8.

The Court of Appeals rejected both the search claim and the Miranda claim. State v. N.M.K., 129 Wn. App. 155, 158-61, 118 P.3d 368 (2005).

¹ "The record is devoid of any information that caused [the officer] to suspect that N.K., an obvious passenger, was the likely suspect rather than either of the two young men standing outside the car."

N.M.K. petitioned for review on the search issue and on the issue of whether a department of licensing letter was properly admitted as evidence. The State did not answer the petition because it had prevailed on both issues below.

This Court granted review on May 31, 2006. Supplemental briefs were filed on July 28, 2006.

4. GROUND FOR RELIEF AND ARGUMENT

Nine weeks after the State filed its supplemental brief, and four business days before the oral argument, Petitioner asks to strike an argument made in the State's supplemental brief. The request should be denied.

N.M.K. misapplies the rules of appellate procedure. He moves to strike claiming that the State has raised a "new issue." It has not; the State has simply provided an additional basis on which to affirm the Court of Appeals and the trial court on the search and seizure issue that was litigated at the Court of Appeals but never at trial.

N.M.K. suggests that the State was required to file a petition or answer in order to challenge the Court of Appeals' holding that he was not "seized." But, the State prevailed at both the Superior Court and Court of Appeals and needed no further affirmative relief. Moreover, given that N.M.K.'S petition squarely presented the search issue, the State was not required to file an answer. See RAP 13.4(d).

This Court rejected a similar argument in State v. Miller, 156 Wn.2d 23, 32 n.5, 123 P.3d 827 (2005). In Miller, the issue was whether the validity of the no-contact order was an element of the crime. The Court of Appeals had assumed it was, and decided the case on different grounds. In the Supreme Court, the State pointed out that validity was not an element of the crime, after all. This Court held agreed. It also denied Miller's motion to strike: "The motion [to strike] is denied. Properly read, the State has not raised new issues for review but has instead responded to arguments made in Miller's petition and reasonably developed issues and arguments raised below."

Similarly, in Blaney v. International Association of Machinists And Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 87 P.3d 757 (2004). The Court of Appeals had held that a jury instruction was erroneous but harmless, and this Court granted a petition challenging the harmless error decision. The Court subsequently rejected the petitioner's claim that the respondent's failure to file an answer precluded her from arguing that the Court of Appeals erred in holding that the jury instruction was erroneous. The Court noted that "[t]he rules merely require the issue be raised." 151 Wn.2d at 210 n.3. Here, N.M.K. directly raised the search issue in his petition.

In essence, N.M.K. confuses "issue" with 'argument.' The State has not raised any new issue. Rather, it has offered a new argument that supports the

Court of Appeals' decision affirming his conviction. This Court may affirm the Court of Appeals' decision on different grounds than used by the lower court.

State v. Moses, 145 Wn.2d 370, 372, 37 P.3d 1216 (2002).

Moreover, the argument N.M.K. wants stricken is part of the State's rebuttal to a state constitutional claim that Petitioner concedes was never argued to the trial court, but which appellate counsel urged on the Court of Appeals. The State argues that it is inappropriate to consider N.M.K.'s new constitutional argument because the litigants at trial never adduced evidence supporting or attacking the constitutional claim, and because the trial court never entered factual findings on point. Now, Petitioner is asking this Court to strike the state's argument out of concern for "notions of fair play" because the State's argument was not raised in the Court of Appeals. Yet, counsel apparently fails to realize that those same "notions of fair play" are the essence of the State's argument -- that Petitioner should not ask this Court to reverse the trial court on a theory of law the trial court was never asked to consider. Thus, according to N.M.K.'s own "notions of fair play," his unpreserved Art. 1 § 7 argument should be stricken. At a minimum, his motion to strike should be denied.

Additionally, even if the court grants his motion to strike, the underlying problem does not simply go away. There are still no findings of fact or conclusions of law on the points needed to address his state constitutional claim.

Thus, an opinion from this Court addressing his argument will either be unmoored from the facts, or purely advisory. Neither is desirable.

Finally, to the extent N.M.K. feels disadvantaged, the problem is of his own making. Had he filed a request for supplemental briefing on the waiver issue immediately after the State filed its supplemental brief (78 days ago), the State would not have opposed such a request, and this Court likely would have granted it. At this late date, however, a motion to strike should be denied.

For all the foregoing reasons, the State respectfully requests that the Court deny N.M.K.'s motion to strike.

DATED this 11th day of October, 2006.

NORM MALENG

King County Prosecuting Attorney

FILED AS ATTACHMENT
TO E-MAIL

By: _____

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Certificate of Service by Mail

Today I sent by electronic mail directed to Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, an electronic copy of the **Response to Motion to Strike**, in STATE V. NATHAN KIRKPATRICK, Cause No. 77719-5, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.
**FILED AS ATTACHMENT
TO E-MAIL**

Name James Whisman
Done in Seattle, Washington

Date 10/11/06

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